## A QUESTION OF HISTORICAL ACCURACY.

MR. DUNN'S attack in the September number of this magazine upon the accuracy of a paragraph in my article on "The Development of State Constitutions" in the June number, seems to call for a defense from me. Much of Mr. Dunn's article is a general argument for the new proposed constitution. Into this, though differing with him on some points, I do not care to enter, but will confine myself to the exceptions he takes to my statements.

The first of these refers to my characterizing the method pursued in drafting and submitting the proposed constitution to the people as a "revolutionary scheme." This he says is "mere unfounded epithet, and not an impartial historical statement." The scheme is, or rather was, revolutionary because it involved the reversal of the best and the strongest tendencies in our constitutional history, both State and national; namely, the regarding of constitution making as a peculiar and most important function of the body politic, to be separated so far as possible from temporary party politics, and to be intrusted to the ablest possible body of men assembled for the exclusive purpose of creating the fundamental law. The constitutional convention, more than almost any other political institution, has commended itself for its representative character and for the ability enlisted in it. One proof of the consistent development of this institution will suffice. In eleven of the thirteen original States, the first State constitution was drawn up by the legislature, but so strongly has the current run toward the use of the constitutional convention, that since the Civil War out of scores of constitutions adopted and a larger number proposed, Mr. Dunn is able to cite only three exceptions, and those only partially such, to the practice of calling conventions to frame State constitutions. Starting in the time of the national constitutional convention at Philadelphia in 1787, the practice has become practically universal. The attempt to dispense with the constitutional convention by proposing a constitution through the legislature, a method

practically abandoned throughout the United States and never used in Indiana, is certainly, as far as it goes, "revolutionary." It is all the more justly characterized as such in that this particular legislature was elected with no thought in the mind of the voters that it would propose a new constitution.

As to my statement that the bill submitting the proposed constitution to the people provides means of counting the Democratic party vote as a vote for the constitution. Mr. Dunn's claim that it involves "the adoption of a principle of vast importance" in no way refutes the plain fact that in this particular instance the intention was to have the Democratic party endorse the measure and have straight Democratic votes counted as votes for it. He surely can not think that the scheme was launched with the vague idea that possibly the Republican and other organizations would officially declare for its adoption. I neither asserted nor denied the wisdom of the general policy of making constitutions and constitutional amendments party measures. I merely summarized the situation as it was. The following assertion of Mr. Dunn, and his qualification of the exception he admits must be taken as evidence of his enthusiam rather than as a test of his historical accuracy: "It is safe to say that by the time it (the proposed constitution) is voted on, it will have received fuller consideration than any constitution ever voted on in America with possibly the exception of the constitution of the United States."

The legislative power of initiative which Mr. Dunn states I deny, I denied only with reference to the Indiana legislature framing a new constitution and submitting it to the people. The argument for this position is too long to give here in full, but it may be based upon the theory of the legislature embodied in our constitution, and on its detailed description of the function of the legislature in proposing amendments, without mention of any power to propose a new constitution. The judicial decision which Mr. Dunn cites deals with legislation and government under the constitution, not to the formulation of a new constitution. That the legislature disregarded provisions in the constitution of 1816 concerning revision, is not proof that it "has the power to submit

to a vote of the people any question of fundamental law, if it be not expressly prohibited by the constitution." If it proves anything, it proves too much, namely the right of the legislature to submit any question even if it be expressly prohibited by the constitution. However, Mr. Dunn's statement that "no vote of the people on the question of calling a convention was taken in 1828 or in 1840" seems open to question, though I have not had time to look it up at first hand. Mr. W. W. Thornton, in his authoritative article on The Laws of Indiana, in this quarterly, Vol. I, p. 27, gives the number of votes cast both in 1828 and in 1840, and speaks of the question being submitted the "fourth time" in 1849.

Mr. Dunn also takes exception to my saying that precedents are against the method used to get the proposed constitution into being and before the people. In doing so he rejects the two occasions on which Indiana adopted constitutions on the ground that the conditions then were different, inasmuch as our present constitution was not in force then. This refusal to accept as precedents the only direct examples we have for the process of constitution making in this State is a good deal like saying that a change of clothing destroys a man's past. As far as Indiana is concerned, precedents call for a constitutional convention, because in the formation of both our constitutions the constitutional convention was one of the most essential elements in the whole process.

In saying that the governor might as well dispense with the legislature in this process, as the legislature eliminates the convention, I was only emphasizing the above fact, and did not seriously propose, as Mr. Dunn seems to think, that the governor assume this power. He is correct in stating that "there cannot be shown, in all the history of Great Britain, or of the United States, a solitary case where an executive undertook to submit a constitution to the people.' The nearest to it that I know of is the present case in question in Indiana, where Mr. Dunn himself really ascribes the proposed constitution not to the legislature, but to the governor: "I feel at liberty to say that to Governor Marshall the purification of the suffrage is the chief feature of

the proposed constitution, and I believe that future generations will be grateful for his effort to remove the existing evil."

My statement that the present constitution "makes no provision for the calling of another constitutional convention, nor does it make any mention of the possibility of a new constitution," is in part admitted by Mr. Dunn and in part denied. I based it on the text of the constitution as interpreted by the discussion in the convention of 1850. Most of the speakers there carefully distinguished between amendments, which they provided for, and the formation of a new constitution to supersede theirs, which they disliked even to consider. To devise power for the legislature to propose a new constitution from the grant of "legislative authority" and the phrase "the people have, at all times, an indefeasible right to alter and reform their government," is in this instance stretching the theory of implied powers too far.

Mr. Dunn further quotes my statement, "If on the other hand, the new constitution be, as is claimed by the opposition, not in fact a new constitution, but a series of amendments to the old, the whole proceeding is plainly unconstitutional," and continues, "This claim is a mere verbal quibble." I understand him to object here not to my statement of the case, but only to the "claim" advanced by the opponents of the constitution who took the matter into court. As my purpose is to defend my historical accuracy and not to argue against the proposed constitution in general, this does not call for discussion in this place.

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